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No. 00-1794

In the Supreme Court of the United States

LOUISIANA PHILHARMONIC ORCHESTRA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service abused its discretion in denying petitioner's application for a preference visa based on a "specialty occupation."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the decision is noted at 248 F.3d 1139 (Table). The order of the district court (Pet. App. 34-41) is not yet reported. The order of the Administrative Appeals Office of the Immigration and Naturalization Service (INS) (Pet. App. 29-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2001. A petition for rehearing was denied on March 2, 2001 (Pet. App. 42-43). The petition for a writ of certiorari was filed on May 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(i)(b) (1994 & Supp. V 1999), authorizes the INS to issue a specific number of preference visas each year to so-called "H-1B aliens," who are aliens who come temporarily to the United States "to perform services * * * in a specialty occupation described in section [214(i)(1)]." Section 214(i)(1) of the INA defines "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific speciality (or its equivalent) as a minimum for entry into the occupation in the United States.

8 U.S.C. 1184(i)(1).

The INS's regulations further provide that to qualify as a "specialty occupation," the position must meet one of the following criteria:

> (*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (*3*) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. 214.2(h)(4)(iii)(A).

The INS's determination whether to grant or deny a preference visa may be set aside on judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see Pet. App. 37.

2. In November 1995, petitioner applied to the INS on behalf of Lingyiang Zhao, a national and citizen of China, for a preference visa for Zhao temporarily to enter the United States, so that petitioner could employ her as a violinist. Petitioner sought to have Zhao classified as an H-1B alien who belonged to a speciality occupation. Pet. App. 20. In support of its application, petitioner submitted information on Zhao's personal qualifications and on the hiring practices of symphony orchestras. *Id.* at 9-12.

In May 1996, the Director of the INS Nebraska Service Center denied petitioner's application. Pet. App. 6-13. The Director found that "[w]hile many musicians in an orchestra hold baccalaureate or higher degrees, formal education to this level is not a requirement for employment," and that positions are often filled as a result of talent demonstrated at blind auditions. *Id.* at 12. Accordingly, the Service Center Director concluded that petitioner had not satisfied its burden of showing that Zhao belonged to a "specialty occupation" and, therefore, had not shown that Zhao was an H-1B alien. *Id.* at 13.

Petitioner appealed to the Administrative Appeals Office (AAO) of the INS.[1] In August 1998, the AAO dismissed petitioner's appeal. Pet. App. 14-19. The AAO affirmed the Service Center Director's finding that petitioner had failed to prove that the position of violinist is a "specialty occupation," explaining that petitioner had not shown that it required its violinists to hold baccalaureate or higher degrees, or that similar orchestras imposed such a requirement. *Id.* at 18. The AAO also noted that the Department of Labor's *Occupational Outlook Handbook* found that there is "no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician," and that the required skills may be obtained through training at conservatories, private study, or practice with other musicians. *Id.* at 19.

Petitioner sought review of the AAO's order in the District Court for the Eastern District of Louisiana. In April 1999, the district court issued a decision setting aside the AAO's decision and remanding. Pet. App. 20-28. The district court rejected petitioner's contention that the AAO had "misapplied its definition of a specialty occupation in such a way that a position qualifies only if it requires knowledge that is always or nearly always associated with a bachelor's degree or higher [degree] rather than knowledge that is usually associated with such a degree," and emphasized that that "type of determination falls within the scope of discretion committed to the agency." *Id.* at 26.

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[1] In the meantime, Zhao entered the United States under a preference visa granted by the INS pursuant to 8 U.S.C. 1101(a)(15)(O)(i), based on her "sustained national or international acclaim," and began to work for petitioner. Zhao, however, subsequently gave birth to a child and left petitioner's employment. See Pet. 9.

The district court nonetheless found that the AAO had failed to explain adequately why it denied petitioner's application after the Service Center Director had granted three previous H-1B alien applications filed by petitioner on behalf of other violinists. Pet. App. 23, 26-27; see also *id.* at 31-32. In light of this "apparent inconsistency," the court remanded to the INS with instructions to grant Zhao's petition or "articulate a rational basis for its inconsistent treatment of the petition." *Id.* at 26-27.

3. In May 1999, the AAO issued a decision addressing the reason for the different result in this case compared with the prior decisions relied upon by petitioner. Pet. App. 29-33. The AAO explained that the three previous approvals were unpublished Service Center Director orders, and "*not* [AAO] decisions," and that they did not bind the AAO because the AAO has supervisory appellate authority over Service Center Director adjudications. *Id.* at 31- 33. The AAO further stated that the prior Service Center Director approvals were erroneous because the beneficiaries, like Zhao, "did not qualify for speciality occupation H-1b visas." *Id.* at 32. The AAO affirmed the other findings and conclusions in its initial decision and dismissed the appeal. *Id.* at 33.

Petitioner sought review of the AAO's decision in the district court. In March 2000, the district court granted judgment for the INS and dismissed petitioner's complaint. Pet. App. 34-41. The court observed that "[t]he INS enjoys broad discretion in deciding whether to grant or deny visa preference classifications." *Id.* at 37 (citing 5 U.S.C. 706(2)(A)). The court then held that the AAO's decision should be sustained, explaining that on remand "the INS has articulated a rational basis for its decision to explain the [apparently] inconsistent treat-

ment of [petitioner's] petition." *Id.* at 39. The prior decisions relied upon by petitioner, the court noted, "were not precedent because they were decided by service centers and not by the [AAO]." *Id.* at 38. Moreover, the AAO had concluded that the prior petitions "were mistakenly approved." *Id.* at 39. After examining the record, the district court further found that "substantial evidence supports the INS decision in this case" that petitioner has not met its burden of proving Zhao belonged to a "speciality occupation." *Id.* at 40.

The court of appeals affirmed in a per curiam decision that adopted the reasoning of the district court's opinion. Pet. App. 1-5. A petition for rehearing was denied. *Id.* at 42-43.

ARGUMENT

The court of appeals' unpublished decision upholding the INS's denial of petitioner's application for a preference visa is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 12) that the INS abused its discretion in denying its application, focusing on the agency's application of the fourth criterion of the regulatory definition of "speciality occupation." That criterion provides that the "knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree." 8 C.F.R. 214.2(h)(4)(iii)(A)(4). The INS reasonably found that petitioner failed to meet that standard. Based on the Department of Labor handbook discussed above and a statement by petitioner's own personnel manager that "[m]usicians are hired by symphony orchestras by blind audition, not on the basis of their education or academic

performance," Pet. App. 10, the AAO reasonably concluded that Zhao did not belong to a specialty occupation. See *id.* at 40. Accordingly, both the district court and the court of appeals properly found that the INS did not abuse its discretion in denying the request for a preference visa.[2]

2. Petitioner contends that the INS unlawfully changed the regulatory standard in 8 C.F.R. 214.2(h)(4)(iii)(A)(4) from "usually associated" to "always or nearly always associated." Pet. 12. That contention is without merit. The AAO did not purport to change the regulatory definition of "specialty occupation" in this case, but instead merely found that "petitioner has failed to establish that any of the four factors enumerated [in the regulation] are present in this proceeding." Pet. App. 18. The administrative record, moreover, established that there was "no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician." *Id.* at 19. That fact in itself precluded a finding that the knowledge required to perform the duties of a musician was "usually associated with the attainment of a baccalaureate or higher degree" under the regulation. 8 C.F.R. 214.2(h)(4)(iii)(A)(4).

In any event, to the extent that the AAO's unpublished and nonbinding (see 8 C.F.R. 103.3(c)) order in this adjudication could be construed as requiring that an occupation must "always or nearly always" require a higher educational degree, it still would not be arbitrary or capricious. Indeed, the INA expressly pro-

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[2] Even if a contrary conclusion would have been supported by the record, that would not in itself be sufficient to warrant reversal by a court. See *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

vides that a "specialty occupation" requires "attainment of a bachelor's or higher degree in the specific speciality (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. 1184(i)(1)(B).

3. Petitioner contends (Pet. 17-20) that the AAO failed adequately to explain its decision to deny the petition, and that the court of appeals should have vacated and remanded for a more detailed explanation. That factbound argument provides no basis for granting certiorari and, in any event, is contradicted by the record. As the district court found, the AAO "considered all of the evidence presented by [petitioner], including the letters from various orchestra directors from around the country, in reaching its decision to deny the petition." Pet. App. 40. The record supports that finding. See *id.* at 10-12, 18-19. Moreover, the AAO's decisions establish that the INS carefully considered petitioner's application, and concluded that petitioner failed to meet its burden in establishing that Zhao belonged to a specialty occupation. See *id.* at 6-13, 16-19, 31-33.

4. Finally, we note that this case would provide a poor vehicle to consider petitioner's factbound claims that the INS improperly denied its application for a preference visa. As petitioner acknowledges (Pet. 9), the INS granted Zhao a preference visa based on her national or international acclaim, which enabled Zhao to enter the country and work for petitioner. See 8 U.S.C. 1101(a)(15)(O)(i). Zhao, however, subsequently left petitioner's employment. Pet. 9. That fact greatly undercuts if not eliminates any continuing basis for

review of the INS's denial of the preference visa application at issue in this case.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner claims (Pet. 9-10) that "[t]he issuance of [the other] visa does not moot this action, because this action presents a recurring issue, which would otherwise evade review." There is no basis for concluding that the issue would evade review in a future case. But even if petitioner's assertion on that point were true for purposes of establishing jurisdiction, the facts that the INS granted a visa to Zhao, and that Zhao no longer is employed by petitioner, makes this case a poor vehicle to consider the questions presented.